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No. 896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

JUNIOR LEE WILLIAMS,
Petitioner,

v.

H. E. MOORE, Warden,
Texas Department of Corrections,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The memorandum opinion of the United States District Court for the Southern District of Texas is unreported and is printed in the record certified by the Clerk of the United States Court of Appeals, Fifth Circuit (R. p. 81). The opinion of the United States Court of Appeals, Fifth Circuit is reported in 262 F. 2d, p. 335.

Jurisdiction

The judgment of the United States Court of Appeals, Fifth Circuit, was entered January 5th, 1959 (R. p. 122).

The jursdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254(1).

Question Presented

Where Petitioner's date of execution passes without event and a new date is set for the execution by the District Court, and where there is no specific State statute governing such a situation, but where there is a State statute which provides that in the absence of any specific statute, the common law will prevail, has Petitioner been denied due process of law as is guaranteed him by XIV Amendment of the Constitution of the United States by the setting of a new execution date?

Statutes Involved

The statutory provisions involved are Articles 23 and 24 of the Code of Criminal Procedure of the State of Texas.

Statutes are printed in Appendix A, infra, page 9.

Statement

The instant cause had its origin in the trial of Petitioner, Junior Lee Williams, for the offense of rape, such crime having been committed in Matagorda County, Texas. Respondent, H. E. Moore, as Warden of the Texas Department of Correction, Huntsville, Texas, now holds custody of Petitioner by virtue of a certain valid judgment rendered in the 23rd Judical District Court of Wharton County, Texas, on March 12, 1956, in Cause No. 4790, entitled The State of Texas v, Junior Lee Williams, wherein Petitioner was convicted. The Court of Criminal Appeals of the State of Texas affirmed such judgment, overruling two motions of Petitioner for a rehearing and issued its mandate to said District Court of Wharton County, Texas, on March 1, 1957. On March 22, 1957, the District Court of Wharton County, Texas, proceeded to pronounce a death sentence upon Petitioner and commanded that it be executed at the State Penitentiary at Huntsville, Texas, on April 24, 1957. On March 26, 1957, the Honorable Price Daniel, Governor of the State of Texas, issued a proclamation granting Petitioner a constitutional reprieve and such reprieve Petitioner did accept. By virtue of such proclamation, the date for the execution of Petitioner's sentence was stayed to May 24, 1957. Upon application of Petitioner's counsel, the Honorable Hugo L. Black, an Associate Justice of the Supreme Court of the United States, entered an order on April 22, 1957, staying the execution of Petitioner's sentence to and including May

7, 1957. On May 7, 1957, Justice Black entered an order further staying the execution of Petitioner's sentence pending the disposition of his petition for a writ of certiorari by the Supreme Court of the United States. On October 14, 1957, the Supreme Court entered its Order No. 12, Miscellaneous, October Term, 1957, denying said petition for writ of certiorari. The aforementioned stays of execution of Petitioner's sentence having expired by their own terms, said District Court of Wharton County, Texas, by order entered on November 22, 1957, set December 24, 1957, as the date for the execution of Petitioner's sentence. On December 19, 1957, Petitioner filed in the United States District Court for the Southern District of Texas an application for writ of habeas corpus, whereupon that Court by a Memorandum and Order entered on December 20, 1957, stayed the execution of Petitioner's sentence pending final disposition of that application. By Memorandum and Order dated February 21, 1958, the Honorable United States District Court for the Southern District of Texas denied Appellant's application for the writ of habeas corpus, finding same to be without merit, and further declined to enter an order to show cause. An appeal was taken by Petitioner to the United States Court of Appeals, 5th Circuit, and the Court in its opinion dated January 5, 1959, affirmed the judgment of the United States District Court for the Southern District of Texas. From that judgment Petitioner files his writ of certiorari of the United States Supreme Court. The opinion of the Texas Court of Criminal Appeals is reported in 298 S. W. 2d, 590.

Argument

Petitioner contends that the setting of a new execution date by the District Court of Wharton County, Texas, after the original date for execution of the sentence has passed, is a denial to him of due process of law and of equal protection of the laws under the Federal Constitution. Respondent urges that in the trial of Petitioner and in the original sentencing of Petitioner all aspects of due process of law and equal protection of the laws under the Federal Constitution were met and none of these rights were denied this Petitioner. The fact that the Governor of Texas granted a constitutional reprieve and that subsequently an Associate Justice of the United States Supreme Court granted two stays of the execution pending the disposition of an application for writ of certiorari, and, further that because of these three stays of execution the original date set for execution of the sentence passed, did not prohibit the trial court from bringing Petitioner back into the Court and setting a new date for execution. The setting of a new date of execution by the trial court was a mere administrative act subsequent to the trial in which Petitioner had been afforded all of his constitutional rights. The setting of a new date for execution of one who has been legally tried is not a denial of due process of law under the United States Constitution. Respondent asserts that Petitioner should not be allowed to take advantage of a circumstance which he caused. The stays of execution were granted at the behest of Petitioner,

and the passing of the date of execution as set for May 24, 1957, by the Governor in his constitutional reprieve, occurred only because of Petitioner's application for the Writ of Certiorari which he filed in the United States Supreme Court.

The ministerial act of setting a new executing date by the District Court constituted the performance of a duty ancillary and incidental to the main trial and judgment, and such act was solely a matter of carrying out the Court's judgment which had not been previously complied with due to Petitioner's own action.

The fact that the Legislature of the State of Texas has not expressly enacted a statute on setting a new date for execution when the date of execution has passed without the sentence having been in fact executed does not in any wise preclude the District Court from setting a new date of executon.

Rsepondent would further show in support of his argument that under Article 23 of the Texas Code of Criminal Procedure, Appendix A, p. 9, that the provisions of the code should be liberally construed so that the objectives which the Legislature sought to attain would be accomplished. The Legislature knowing full well that there would be instances and circumstances that were not covered by the provisions of the Code and realizing that a method would be needed to accomplish this, enacted Article 24 of the Texas Code of Criminal Procedure, Ap-

pendix A, p. 9, which states that where the code fails to provide any rule of procedure in any particular case that may arise, then the rules of the common law, upon which all laws in this state are based, shall be applied in that particular case. In determining what the common law rule is, we refer to 16 Corpus Juris, p. 1331, which states that where the day of execution of a prisoner has passed without the sentence of death being executed because the court granted a postponement of the execution on the application of accused, this does not entitle the accused to his discharge for the reason that the sentence of death was not accomplished on the date that the court originally set for execution and the court may, either with or without a new sentence designate another day for the execution of the sentence. On page 1304, par. 3080 of the same volume of Corpus Juris, it is stated that at common law the designation of the time and place of the execution in a capital case, was, strictly speaking, no part of the judgment or sentence.

The Decision Below Is Clearly Correct

As stated by the Fifth Circuit Court in its decision, the State District Court has the implied and inherent authority to provide for the execution of its judgment. The court was correct in its holding that this does not contravene the Constituton of the United States. It is well settled law as is stated in *Erie R. Co. v. Tompkins*, 1938, 304 U.S. 64, 78:

> "And whether the law of this State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of Federal concern."

It is Respondent's contention that the principle established in *Erie R. Co. v. Tompkins* has been followed in this instance.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

LEON F. PESEK
Assistant Attorney General

LINWARD SHIVERS
Assistant Attorney General

NOTICE OF SERVICE

STATE OF TEXAS)
COUNTY OF TRAVIS)

On this ..... day of May, A. D. 1959, personally came and appeared Leon F. Pesek known to me to be the person who makes the hereinafter affidavit.

I, Leon F. Pesek, am attorney for Respondent in the above entitled matter, hereby certify that on the ..... day of May, 1959, I served the Petitioner with a copy of such brief by sending same to his Attorney of Record, Hon. Thomas H. Dent, 2517½ Market Street, Galveston, Texas, said address being the last known address of Petitioner's Counsel by depositing same in a United States Post Office with First Class postage prepaid, in compliance with Rule 33, U.S. Code Annotated.

.....
Leon F. Pesek

Sworn to and subscribed before me this ..... day of May, 1959.

.....
Notary Public in and for Travis County, Texas

APPENDIX A

Articles 23 and 24 of the Texas Code of Criminal Procedure reads as follows:

Art. 23. Construction of this Code

"The provisions of this Code shall be liberally construed, so as to attain the objects intended by the legislature: The prevention, suppression and punishment of crime.

Art. 24. Common law governs

"If this Code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern.